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No. 754

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

THE STATE OF TEXAS, ET AL.,
Appellants

versus

THE UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellees

On Appeal From the District Court of the United States for the Western District of Oklahoma

BRIEF OF STATE OF TEXAS, RAILROAD COMMISSION OF TEXAS, KNOX GLASS BOTTLE COMPANY OF MISSISSIPPI, AND OWENS-ILLINOIS GLASS COMPANY, APPELLANTS, IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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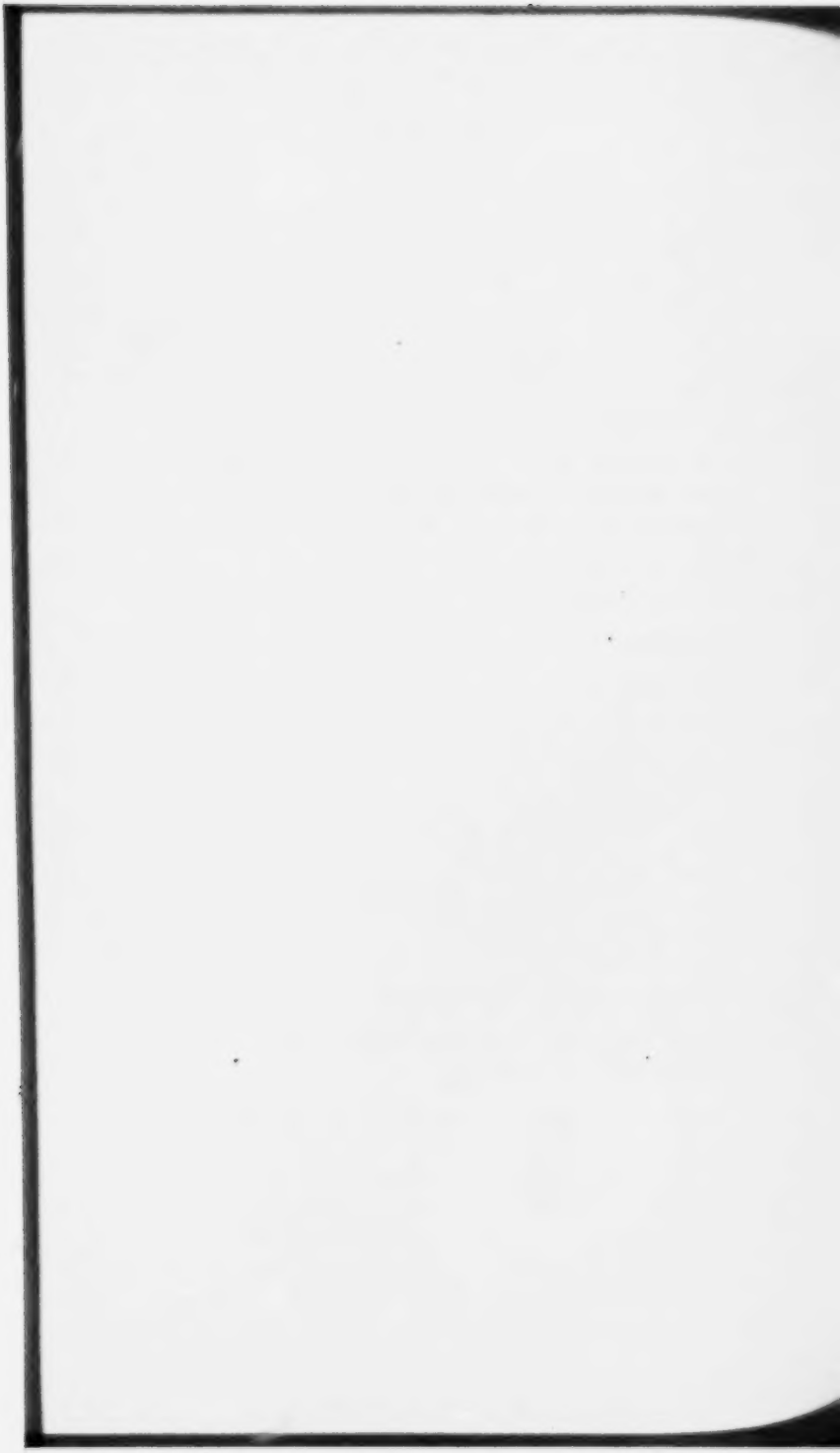

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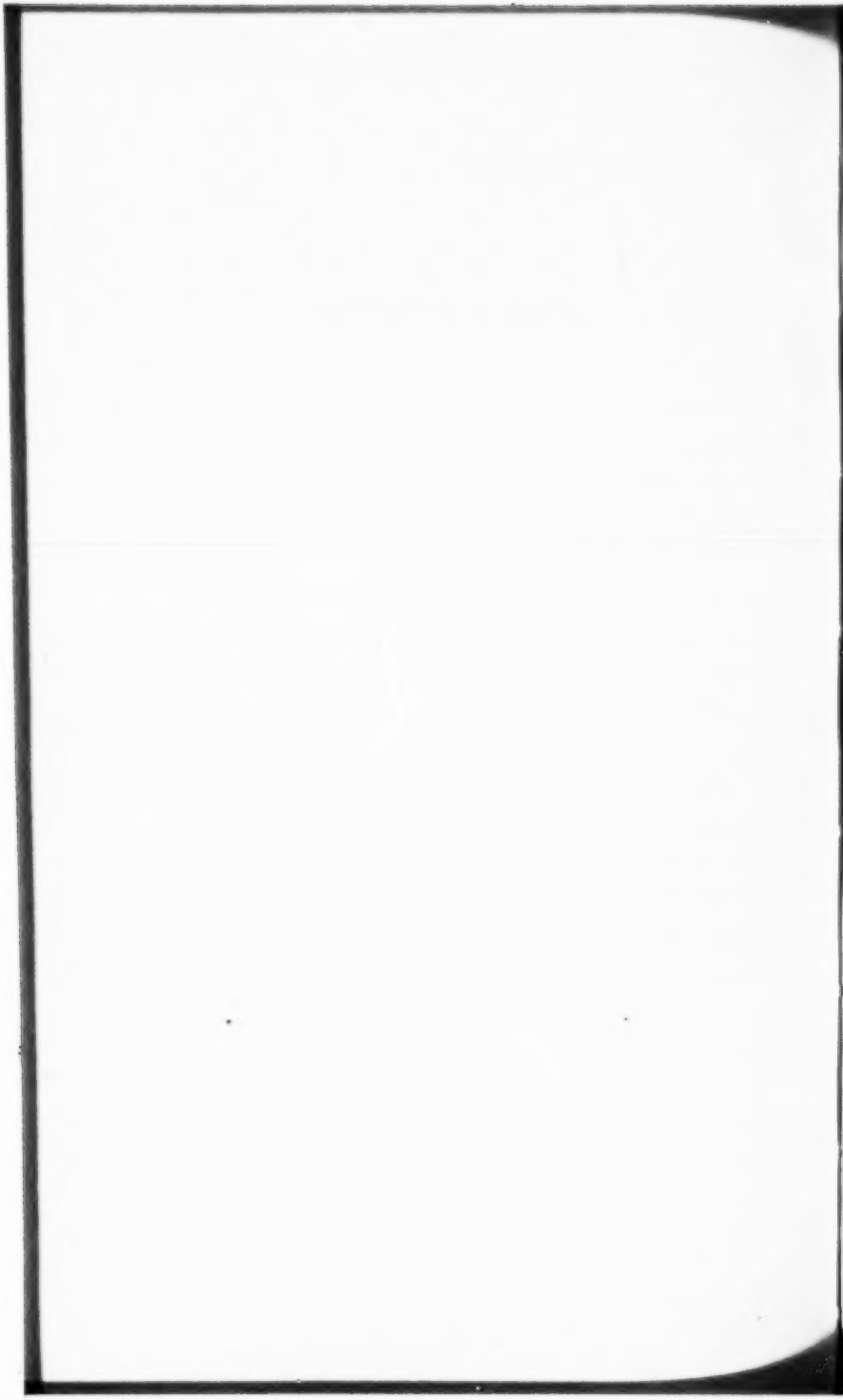

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INTRODUCTION

Pursuant to Rule 7, Paragraph 3 of the Revised Rules of this Court, Appellants, State of Texas, Railroad Commission of Texas, Knox Glass Bottle Company of Mississippi, and Owens-Illinois Glass Com-

pany[1] file this their brief in opposition to Appellees' Motion to Affirm.

The position of these Appellants, with the exception of certain evidentiary particulars, is identical with that of Appellants, State of Louisiana, Louisiana Public Service Company and Libbey-Owens-Ford Glass Company. For that reason, we adopt their brief heretofore filed herein. However, insofar as the evidence relates particularly to these Appellants, we desire to submit additional argument.

SUMMARY OF ARGUMENT

The findings by the Interstate Commerce Commission[2] and the District Court that the Texas intrastate soda ash rate to Palestine and Waco results in undue preference and prejudice are not supported by substantial, sufficient, or competent evidence as prescribed by this Court. *North Carolina v. United States,* 325 U.S. 507, 89 L. Ed. 1760, and cases therein cited.

Argument and Authorities

This Court in *North Carolina v. United States,* supra, clearly stated that before the Interstate Commerce Commission can "nullify", "supplant" or give "precedence to federal rates", "a high standard of certainty" must be met; "justification . . . must clearly appear"; and "clear findings, supported by evidence of each element essential to the exercise of that power" appear. In this case the Commission has admittedly

[1]Owens-Illinois Glass Company operates a plant at Waco, Texas; Knox Glass Bottle Company of Mississippi has a plant located at Palestine, Texas.

[2]Exhibit "D" to complaint.

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made "clear findings", but the evidence does not meet or even approach the "high standard of certainty" required. Rather, the evidence here does not support the findings, and neither does it afford a clear justification for the Commission's order overturning the Texas intrastate rate on soda ash to Palestine and Waco. The questions relating thereto are so serious and substantial that a dissent to the majority opinion below was made by Judge Vaught, who wrote:

> "The evidence upon which the Commission's findings are based, in my judgment, is incompetent, consisting of conclusions, and does not approach that 'high standard of certainty' prescribed by the Supreme Court. . . ."

The decision to be made in this case, therefore, is: Was the Commission's order overturning the Texas intrastate soda ash rate to Palestine and Waco clearly justified on the basis of the evidence presented?

That the question is substantial is at once apparent. It is as was said in *Houston and Texas Ry. v. United States,* 234 U.S. 342, 58 L. Ed. 1341, 34 S. Ct. 833:

> "We are not unmindful of the gravity of the question that is presented when State and Federal views conflict."

It becomes necessary, then, to give serious consideration to the evidence bearing upon the Texas soda ash rate, which has been condemned by the Commission.

Competition

The only testimony in the record which could even remotely establish competition between any of the complaining glass companies and the Texas glass manu-

facturers at Waco and Palestine is found in that of Mr. John Bernier, Vice-President of Kerr Glass Manufacturing Corporation, located at Sand Springs, Oklahoma. He stated "we manufacture glass jars and jelly glasses" (Tr. 15); "Our Sand Springs factory serves generally the territory west of the Mississippi River and east of the Rocky Mountains from Canada to the Gulf. In serving this territory we meet competition from manufacturers not only located in Oklahoma but those located at such points as Palestine, Waco and Wichita Falls, Texas" (Tr. 16); and, "Competition in the glass container industry is keen. . . ." (Tr. 18).

These statements are mere conclusions unsupported by any evidentiary fact. They are nothing more than general declarations. The Commission itself has many times refused to permit such testimony to establish competition. In *Barrett v. A.T. and S.F. Railway Co.*, 172 I.C.C. 319, it was said:

> "General declarations as to competition or injury unsupported by evidentiary facts, and a mere showing of a disparity of rates are not sufficient for predication of a finding of undue preference and prejudice.'"[3]

Another Oklahoma citizen, Mr. D. C. Hamilton, Vice-President and General Manager of Bartlett-Collins Company at Sapulpa, Oklahoma, manufacturers

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[3]In support of this principle the Commission cited Florida v. United States, 282 U.S. 194; Kirby-Bonner Lumber Co. v. Director General, 78 I.C.C. 333, 335; Mutual Creamery Co. v. American Railway Express Co., 132 I.C.C. 207, 221; Aluminum Co. of America v. A.T. & S.F. Railway Co., 146 I.C.C. 363, 372; Intrastate Rates within Louisiana, 164 I.C.C. 600, 616; American Sugar Refining Co. v. C.B. & Q. Railroad Co., 169 I.C.C. 557, 568.

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of glass tableware, stated that there are no competitors in the Southwest with the products he manufactures (Tr. 124).

Mr. O. C. Hubbard, General Manager, Radiant Glass Company, Ft. Smith, Arkansas, stated his company makes water glasses, water bottles, glass bottles, water jars, lamp chimneys and light globes (Tr. 48). But he declared that his Texas competitor was at Brownwood (Tr. 49), and he did not compete with Palestine (Tr. 50).

Thus we see clearly that this evidence falls far short of meeting the requirements firmly established by the Commission prior to its finding here. This testimony is all the complaining companies offered as to competition. Measured by the standards required by this Court in *North Carolina v. United States,* supra, the finding regarding competition should fall.

Disadvantage

We have seen the weakness of the findings relating to the existence of competition. But as to disadvantage, harm or injury, vital to a valid finding of undue prejudice, the evidence is totally lacking. Again we refer to the testimony of Mr. Bernier, Mr. Hamilton and Mr. Hubbard for therein lies the only mention of prejudice.

Mr. Bernier said that "with a relatively higher rate on soda ash applying to our factory in Oklahoma as compared to the rates to the factories of our competitors, puts us at a very great disadvantage (Tr. 16). He further stated ". . . as is evidenced by the location of such factories as the ones at Palestine and Waco, Texas, it is evident that they are located where all

things, including rates on inbound materials, are most favorable, and unless the Oklahoma and Arkansas factories are accorded rates on the same relative basis as those of competitors they are going to continue to be seriously affected during the post-war period." (Tr. 18).

Here again is the same type of general declaration made concerning competition with Waco and Palestine. Here again is an opinion and conclusion, vague and uncertain because it finds no support in a single evidentiary fact showing in any degree whatever how or to what extent the difference in the inbound rate to Waco and Palestine, as contrasted with those to Oklahoma destinations, curtails, retards or prevents complainants' shipments on any commodity either inbound or outbound. This same type of evidence has repeatedly met with failure before the Commission. In *Bronstein v. B. & O. Railroad Co.*, 215 I.C.C. 136, this principle was clearly announced as follows:

> "In support of the allegation of undue prejudice, complainants state that because of the 56½c rate from the belt to New York, merchants at interior points such as Scranton and Wilkes-Barre, Pa., buy their grapes at New York instead of Philadelphia. There is no evidence (1) of any shipments from the belt to New York, (2) that complainants' competitors at New York obtained any advantage as a result of the rate situation, or (3) that complainants were at a disadvantage in, or prevented from, making shipments because of the alleged preferentially lower rate to New York. A disparity of rates does not necessarily result in undue prejudice. *It must also appear that shipments are made or prevented because of the rate relation. This record contains no such evidence. The principle is 'firmly established that undue prejudice and preference must be proven by clear*

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and unmistakable evidence. General declarations of the character herein presented as to competition or injury unsupported by evidentiary facts are not sufficient.'" (Italics ours)

Mr. Hubbard and Mr. Hamilton, both of whom refuted any existing competition with Waco or Palestine plants, did not make even a general statement of being at a disadvantage because of the difference in the rates.

So, at most, the evidence presents only an assumption of undue preference and prejudice.

But Appellees contend in their Motion to Affirm:

> "A second judicial scrutiny of the record to determine the adequacy of evidence to sustain a rate order made by an administrative agency would be a burdensome exercise of appellate review not called for in the interest of orderly and efficient administration of justice."

Perhaps a second judicial review may be "burdensome", but not in the sense presented by Appellees. It may be "burdensome" to reiterate again and again to the Commission that it must meet "a high standard of certainty" in cases of this nature before nullification of a State's intrastate rate can be sustained. In any event, the questions presented by the appeal from the judgment below are of such substantial nature as to warrant their determination and disposition by this Court.

'See also Kistler Leather Co. v. B&O Railroad Co., 171 I.C.C. 659; Barrett Co. v. AT&SF Railway Co., 172 I.C.C. 319; Rathkamp Bros. Co. v. N&W Railway Co., 179 I.C.C. 25; Abrasive Co. v. Erie Railroad Co., 183 I.C.C. 103; Farmers Distributing Co., Inc. v. AT&SF Railway Co., 214 I.C.C. 796; Indiana Gas and Chemical Corp. v. B&O Railroad Co., 222 I.C.C. 618.

CONCLUSION

The Appellees' Motion to Affirm should be overruled.

Respectfully submitted,

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